IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 10TH DECEMBER 2007 / 19TH AGRAHAYANA 1929

CRP.No. 953 of 2003()

AGAINST THE ORDER DATED 27/03/2003 IN IA. 856 /2003 IN OS.212/2002 of PRL.M.C., KOCHI

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REVN. PETITIONER: PETITIONER/PLAINTIFF:

MARY, D/O. RAPHAEL,
MOOTHERIL VEETTIL, KUMBALANGHY AND
W/O. KADAVIL VEETTIL AUGUSTINE, NAMBIAPURAM ROAD,
PALLURUTHY, KOCHI TALUK.

BY ADV. SRI.N.N.SUGUNAPALAN (SR.)

RESPONDENTS: RESPONDENTS/DEFENDANTS:

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1. ANNAMMA, W/O. RAPHAEL,
MOOTHERIL VEETTIL, KUMBALANGHI.

2. VARUTHUKUTTY, S/O. RAPHAEL,
MOOTHERIL VEETTIL, THOPPUMPADY.

3. SELINA, W/O. RAPHAEL,
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4. JOSEPH, S/O. RAPHAEL,
MOOTHERIL VEETTIL, KUMBALANGHI.

BY ADV. SRI.DINESH MATHEW J.MURICKEN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CRP.No. 953 of 2003

ORDER ON C.M.P.2276/2003

DISMISSED.

10.12.2007 **SD/- K.T.SANKARAN, JUDGE**

(TRUE COPY)

P.A TO JUDGE

K.T.SANKARAN, J

C.R.P.953/2003

Dated this the 10th day of December, 2007

ORDER

Plaintiff in O.S.212/2002 on the file of the Court of the Principal Munsiff of Kochi challenges in this revision the order dated 27.3.2003 by which the Court below rejected the prayer made by the petitioner to withdraw the Suit with liberty to institute a fresh Suit.

2. The suit is filed for partition and separate possession of the petitioner's share. The defendants disputed the right of the plaintiff to get a share. Evidence on the side of the revision petitioner, plaintiff, was over. According to the defendants 1 and 2, they alone are entitled to kudikidappu right.

3. Application under Order 23 Rule 1 was filed on the ground that the defendants 1 and 2 did not adduce any evidence and they suppressed the material facts and documents and therefore, it is necessary for the

plaintiff to adduce more evidence to establish her claim. There is no case for the plaintiff that the suit must fail because of any formal defect and therefore, it is necessary to permit her to withdraw the suit with liberty to file a fresh Suit.

4. The Court below noticed that the failure of the plaintiff to produce sufficient evidence at the trial is not a ground to permit her to withdraw the suit with liberty to file a fresh suit.

5. Rule 1 of Order 23 of the Code of Civil Procedure provides for abandoning a suit and also for withdrawal of the suit with permission of the Court to institute another suit. For abandoning the suit, no permission is required. After abandoning the suit, the plaintiff will not be entitled to institute a fresh suit. Withdrawal of the suit with permission to institute fresh suit is different from abandonment. If the grounds under Sub rule (3) of Rule 1 of Order 23 are made out, the Court may

permit the plaintiff to withdraw the suit with liberty to institute a fresh suit. The conditions to be satisfied are:-(a). that the suit must fail by reason of some formal defect or (b). that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of the claim.

6. There is no case for the plaintiff that the suit must fail on account of some formal defect. The contention put forward by the plaintiff that the defendants suppressed material documents and evidence which necessitates the plaintiff to produce further evidence and for that purpose she may be permitted to withdraw the suit, is not a ground as contemplated under Order 23 Rule 1(3). Failure to produce evidence at the trial by the plaintiff and the hope of the plaintiff that she may be able to adduce more evidence and produce more documents at a later point of time, is not a ground for seeking permission to withdraw the suit

with liberty to institute a fresh suit. Order 23 Rule 1 is not intended to achieve such purposes. A party cannot be permitted to protract the litigation by withdrawing the suit with permission to institute a fresh suit where the ingredients of clause (a) or (b) of Sub rule 3 of Rule 1 of Order 23 are not made out.

7. In **AIR 1983 Madras 160** Division Bench of Madras High Court held that "the failure or inability of the plaintiff to secure necessary evidence to support his case will not be a ground as contemplated in Rule 1 (3) (b) of Order 23. The expression 'sufficient grounds' occurring in Rule 1 (3)(b) will not take in, dismissal of a suit on the ground that the plaintiff has not established his case. The object of the rule is not to enable the plaintiff, after he has failed to establish his case, by adducing requisite evidence to have a further opportunity to file a fresh Suit to re-agitate the matter so as to prejudice the other side. If such a thing is permitted, there will be no end to any litigation". I

respectfully follow the Division Bench decision of the Madras High Court in **AIR 1983 Madras 160.**

8. The Court below, after considering the contentions put forward by the revision petitioner, held that the plaintiff has failed to establish that there are sufficient grounds as provided under Sub rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure. For the aforesaid reasons, I am of the view that there is no merit in this revision petition and the same is accordingly dismissed. No order as to costs.

K.T.SANKARAN
Judge

mrcs